



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION**

Criminal Case 50 of 2003

REPUBLIC PROSECUTOR

VERSUS

RAYMOND KIPTOO ROTICH ACCUSED

JUDGMENT

The Accused faces charge of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap.63 Laws of Kenya).

It is alleged that on 20th November 1999 at Kenchic along Tigoni Karuri Road in Kiambu District he murdered David Kamau Gakere.

It is sufficiently evident from the evidence on record led by both sides that the Accused was, at the material time, a police officer and was issued with a firearm seiska bearing serial No.73670 (Ex.4) and 30 rounds of live ammunitions of .9 mm in caliber.

In my opinion the Prosecution has proved the first link of murder namely, death of the deceased which was caused as per evidence of the pathologist Dr. J. Wasike (PW.9) by a gun shot wound to the chest. Thus it has been proved that the death of the deceased was as a result of external force. The body of the deceased was duly identified by Maurice Chege Wanyama (PW.5) before the autopsy on the body was performed at the City Mortuary by Dr. Olumbe who had migrated to Australia. Dr. Wasike on an application made by the Learned State Counsel was permitted to produce and give evidence on the Post Mortem report under sections 77 and 33 of the Evidence Act (Cap.80).

PW.1 Francis Gichuhi Mwangi, PW.4 Godfrey Maina and PW.6 Amon Muthumbi were with the deceased on the fatal night i.e. 20th November, 1999. They all stated that four of them were returning from a party at around 9.00 p.m. On the way when they were walking home, a vehicle passed them.

I shall deal with their individual testimony as it is relevant to the case before me.

PW.1 stated that he lived at the farm of one Mr. Brown (PW.3) and went to a circumcision ceremony with the deceased and met PW.4 and PW.6 at that party. He said they all four left the party to walk back home around 9.00 p.m. and stated that he was not aware whether any of the three drank alcohol but stressed that he did not. A vehicle passed them and after they had walked a bit further, it made a U-turn and followed them. They gave way but then he heard a gun shot from a distance of 15 to 20 feet. On hearing the gun shot PW.4 and PW.6 started running away and he heard the deceased screaming that he was dead but also followed the two. On not finding the deceased he went to the vehicle and asked its driver what wrong had they done but the driver came out and started beating him and put him in booth of his car. He heard some other people from the car but did not see them. He was taken to Pangani Police

Station at the O.B. counter. He saw the driver properly and clearly in the Police Station. He was asked questions and then released.

Thereafter on 26th November, 1999 he identified the Accused at an Identification Parade at Kiambu Police Station. Chief Inspector of Police Boniface Mwaura (PW.13) conducted the said identification parade on 26th November 1999 wherein the Accused was identified by PW.1. At that time the Accused remarked that the witness was coached but in his comments he stated that parade was properly conducted. He further stated that he did not know the reason why he stated that the suspect was coached during cross-examination. Nothing was put to him by the Learned Defence Counsel. I note thus because in his testimony the Accused only stated that the witness was watching him from up. He did not state from where and how. In cross-examination PW.1 placed the time of the incident after 10.00 p.m. as he stated they reached road from the place of ceremony at around 10.00 p.m.

PW.4 similarly stated that he left the place of ceremony in company of the deceased, PW.1 and PW.6. He saw a vehicle passing them and then turning and following them behind and when they were walking he heard **'a noise of something being burst'**. The noise came from the vehicle and simultaneously he heard the deceased screaming that they had killed him. On hearing this he ran and joined by PW.6. Only PW.1 did not run. When he reached a bush he stopped and watched from there what was transpiring. From the parking and brake lights of the vehicle he saw PW.1 being placed in boot of the vehicle which turned once again and drove off. Next day after search they were told where the body was lying and deceased's brother (Gichuki) went and found the body which was later removed by the Police. In cross-examination he said it was a dark night and he **did not see** the vehicle turning, but heard what he had testified.

Lastly, PW.6 testified that he left the place of ceremony around 9.50 p.m. in the company of the deceased, PW.1 and PW.4. On the road a vehicle passed them coming from Banana direction. It made U-turn thereafter and he heard sound of a gunshot. He ran away and heard shouts from the deceased **'Oui, I am dead'**. He specified that he heard gunshot coming from the vehicle. He also stated in cross-examination that he did not **see** either the vehicle making U-turn or gunshot coming from the said vehicle. He only heard the same.

PW.2 Faith Muthoni is a girl-friend to the Accused. I must note here that the Learned State Counsel had quite a problem in dealing with her testimony which only fell short of being that of a hostile witness. According to her testimony, she was with the Accused at about 9.00 p.m. at the Karuri Police Station canteen where she had been drinking. The Accused joined her and they drank upto 11.00 p.m. Then they left in his vehicle to go and sleep at his home. She slept in the vehicle and was woken up by the Accused on reaching his house. The Accused told her when they entered the house that they met some people who stopped him on the way but did not give any further details to her. She also stated that he voluntarily signed her statement to the police but then added that she was also put in cells and wanted to get out from there. She later learnt that her boy-friend (Accused) was alleged to have killed a person at Tigoni.

This is the evidence from the witnesses who were either with the deceased or with the Accused at the time the incident occurred.

Some evidence was also led on the activities of the Accused the next day. Chief Inspector Joseph Muguna (PW.11) who was at the material time attached to Karuri Flying Squad testified that on 21st November, 1999, the day after the incident, the Accused came to his office and asked for change of number plates of his vehicle which were bearing Registration No. KAD 810 K. It was about 2.00 p.m. He did not have any spare number plates and advised him to go to C.I.D. headquarters to do so. He then went out for some duties and on his return found that vehicle of the Accused bore different number plates which were KAJ 145 J. On inquiry he was told that the Accused was seen carrying those plates from an office. However, he did not give further details. He further stressed that an officer has to take prior permission from his superior before changing the number plates. Because he was housed at area of Tigoni the Accused used to visit the station almost daily and that his vehicle belonged to Pangani Flying Squad.

He also agreed that the vehicle was involved in a shootout on 20th September 1999 along Ruaraka

Tigoni Area at 11.00 p.m. but stressed that the Accused did not give the reason of that shootout for changing his number plates. He asked for change of tyres on 21st September, 1999. What the Accused informed him was that he wanted to change the number plates as he had been using the same for a long time.

Chief Inspector George Pundi (PW.12) was at the relevant time Deputy OCS at Tigoni Police Station and on 21st November, 1999 after call-up at 6.30 a.m. he was informed by PC. Kinyanjui and PC. Kebiro that the Accused had come previous night to the Station with a person and informed them that he had shot at someone. However, I cannot accept this evidence because (1) none of the named officers is called to corroborate or confirm the same and (2) the incident was not recorded or booked in the O.B.

This witness also testified that at 11.00 a.m. on 21st November 1999 he received a report that a body was lying near Kenchic. He rushed to the scene with other officers and found a body with injuries which looked like gunshot wound. The body was later removed to City Mortuary.

PW.3 William Thomas Llyod is the employer of the deceased. According to his evidence he was informed at 9.00 a.m. on 21st November, 1999 that the deceased was shot. He went to Tigoni Police Station the police arrived after mid-day and the body was removed by them.

PW.10 Lawrence Nthiwa a firearms examining officer, after an application was made under Section 77 and 33 of Evidence Act, was permitted to produce and gave evidence on the Ballistic Report prepared by William Lahanga who had retired from the service and was not traceable without undue delay. The expert received a Seiska Pistol Serial No.F 73670, a fired bullet and 19 rounds of live ammunition, which was escorted by Cpl. Veraazio Njru (PW. 14).

The Seiska Pistol was examined and was found to be in good condition and capable of being fired. Of course it was also found to be a fire arm in terms of Fire Arms Act Cap 114 laws of Kenya.

Similarly he test fired three rounds of ammunition from 19 rounds sent to him and found that all of the rounds were live and capable of being fired with Seiska pistol.

The fired bullet received was damaged and appeared to have struck an object on impact. It was explained during cross-examination that the said impact could have occurred after it penetrated a body. He also stressed and reiterated that it was safe for the Fire Arms Expert to arrive at an opinion that the fired bullet was used from the Seiska pistol on hand. He explained further that no two fire arms could leave same marks and that the expert who had made the report had found sufficient matching rifling striations to arrive at his conclusion and that there would be zero error on such matching. In the post mortem report (Ex.2) it is mentioned that the bullet head projectile was lodged in pectoral muscle.

The Accused gave sworn testimony and stated that he was in Karuri Police Canteen till 11 p.m. with PW.2. Then they went home and slept.

He has also testified that as per OB. No.8 of Pangani Police Station of 13th November, 1999 (P Ex.1) he had fired eight rounds of ammunitions issued to him. Then he added that he similarly used three rounds of ammunition in October 1999. He did not either specify the date or place and reasons for such firings or produced the OB to confirm the averment. He said the OB has not been traced from the Police Station. Thus according to him, he has accounted for eleven rounds which were used from 30 rounds issued to him. It is on record that 19 rounds were recovered from him after his arrest.

In response to evidence of his identification by PW.1, who has testified that he was put in the boot of the vehicle and taken to Tigoni Police Station by the Accused, the Accused simply stated that the witness has seen him from up. He did not specify or explain from where and how. I shall also note his comments given to the officer who conducted the Identification Parade. He has not stated to him at Identification Parade what he has testified before me.

As regards evidence on change of number plates by him, he responded that it was usual and that his

vehicle was involved in many accidents of shoot out. There was one such shoot out at 4 p.m. on 20th November, 1999 and despite the fact that there was crossfire he did not fire any rounds himself. He agreed that he heard someone had died in a shoot out that day but denied that he fired any round.

At this juncture I do note the evidence of PW.11 who specifically stated that the Accused did not mention the said shoot out as a reason for his request to change the number plates. I also note that the Accused did not state that he had changed the number plates with permission from his superior. He did not tell how he managed to change the same despite refusal by PW.11.

On his defence of alibi raised the Accused obviously seems to be relying on the evidence of PW.2 who is undeniably his girlfriend. Her demeanour had been noted very carefully by the court and I cannot say that I could rely on her evidence totally. Moreover it is conceded by her that she was drunk and her evidence of leaving the canteen at 11.00 p.m. could be placed side by side with the testimonies of three witnesses who were with the deceased, who stated that they were on the road around 10 p.m. I also consider the fact that PW.2 had stated that the Accused told her when they entered his house that he met with some strange people on the road. She has not stated what time it was that they entered home. This part of her evidence in my view corroborates testimonies of PW.1, PW.4 and PW.6, even though there is some discrepancies as to times given by them. In my opinion, after noticing their demeanors give more credence to their testimonies as straight forwards and uncoached.

PW.1's testimony of him being placed in booth of the vehicle is corroborated by evidence of PW.4 and also from his identification of the Accused at the Identification parade. He has given reasons for his ability to identify the Accused by stating that when at Tigoni he saw the Accused clearly. There is nothing on record that there was any reason for any of these witnesses to concoct a story against the Accused. PW.1 was a total stranger to the Accused and vice versa.

No ulterior motive is suggested from the defence. Thus, I cannot ignore the consistent versions from the three prosecution witnesses and cannot agree that there was any possibility of mistake when PW.1 identified the Accused.

This finding places the Accused on the scene of the material time. The damaged fired bullet was in the body of the deceased and was positively found to have been fired from the firearm issued to the Accused. There is no suggestion on anything on record to the effect that the fired damaged bullet could have been recovered from any other place. The Fire Arm Expert also gave an opinion that the bullet could be damaged from the impact of penetration in the body. I have made my adequate observations on the evidence of the Fire Arm Expert (PW.10).

The Accused explained the user of 11 rounds of ammunition in his defence. This is the fact within his own knowledge and as per Section 111 of Evidence Act the burden thus shifts to the Accused to prove the same. He has satisfactorily proved his use of eight rounds by producing the O.B. (D.Ex.1). However, the further use of 3 rounds has in my view created doubt on any possibility as to its credibility. He also stated that there was a shoot out on 20th November, 1999 whose details he did not give and that one person was killed but denied that he used any fire arm. As against this evidence I have clear and corroborated evidence of three witnesses (PW.1, PW.4 and PW.6) supported by evidence of Fire Arm Examiner.

In total absence of the reason of shoot out when the four citizens of this country were walking on a public road, I cannot even assume that the same was committed in pursuance of the police duty by the Accused.

He as a police officer should have been aware of his responsibilities. One cannot use a firearm for his own frolic which seems to be the case here.

In the premises, I find that the Prosecution has proved its case beyond reasonable doubt. I thus enter a finding of guilty against the Accused and convict him for the offence of murder as leveled against him.

As the law provides a mandatory sentence, I sentence him to death. The Assessors have also given

opinion of guilty against the Accused.

Right of Appeal within 14 days.

Dated and Signed at Nairobi this 12th July, 2005.

K.H. RAWAL

JUDGE

12.7.05